IN THE

Supreme Court of Florida

CONNINE HOFFMAN also known as CONNIE GONZALEZ and DEWEY McLAUGHLIN,

Defendants-Appellants,

vs.

THE STATE OF FLORIDA

Plaintiff-Appellee.

BRIEF OF DEFENDANTS-APPELLANTS

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APPENDIX "A"

STATEMENT OF THE CASE

Defendants were arrested in February, 1962 and charged with having violated Section 798.05 of the Florida statutes in that "the said Dewey McLaughlin, being a Negro man, and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room." (R2, 94) Defendant Connie Hoffman began residing in a one room apartment at 732 Second Street, Miami Beach, Florida in April, 1961. (R29) The owner of the premises, Mrs. Dora Goodnick, testified that she saw the defendant McLaughlin at various times in December, 1961 and February, 1962 come into the apartment house at night and leave in the morning. (R32-34) Mrs. Goodnick also claimed to have seen defendant McLaughlin showering in the bathroom and heard him talking to defendant Hoffman in her apartment at night. (R42-44) Defendant Hoffman told Mrs. Goodnick that defendant McLaughlin was her husband. (R30) Mrs. Goodnick stated that she was disturbed that a colored man was living in her house and consequently reported the situation to the police. (R31)

Detective Stanley Marcus and Detective Nicolas Valeriana of the Miami Beach Police Department went to defendant Hoffman's apartment at 7:15 P.M. on February 23, 1962 to investigate a charge that the defendant was contributing to the delinquency of her minor son. (R 52-54). They knocked at the apartment

door and a man's voice answered, "Connie, come in," but the apartment door was not opened. (R53-54) Detective Valeriana went around to the back of the apartment and found defendant McLaughlin exiting from the rear door. (R62) In the questioning which followed, defendant Hoffman admitted that he had been living on the premises with defendant Hoffman, (R65) and that on at least one occasion he had had sexual relations with her. (R72) The detectives also observed pieces of defendant McLaughlin's wearing apparel draped across the furniture in the room. (R69) Defendant Hoffman came to the police station where defendant McLaughlin was being held and while there stated that she was living with a Negro but thought that this was not unlawful. (R74) Detective Valeriana identified defendant Connie Hoffman as a white woman and defendant McLaughlin as a Negro from their appearances. (R92-93, 95)

Josephine De Cesare, a secretary in the City Manager's Office, testified that in the process of securing a civilian registration card, the defendant McLaughlin stated that he "was separated and that his wife's name was Willie McLaughlin." (R119) Dorothy Kaabe, a child welfare worker in the Florida State Department of Public Welfare testified that in an interview on March 5, 1962, defendant Hoffman stated that she began living with the defendant McLaughlin as her common law husband since October 1961 but had never had a formal marriage to him. (R135)

Prior to trial defendants moved to quash information alleging that it was vague, indefinite, and de-

signed to prevent a fair trial. It was further alleged that the statute under which the information was drawn was null and void under the Constitution of the United States in that it was vague, denied due process and equal protection of the laws, and was an invasion of defendants right of privacy. (R4-5) The motion to quash the information was denied. During the trial defendants made an oral request for a directed verdict on the grounds that the state had failed to make adequate proof that defendant McLaughlin was a Negro under Section 1.01 of the Florida statutes which sets forth the criteria for identifying a "Negro" whenever that term is used in a statute. The motion for directed verdict was denied. (R97-100) Upon submitting the case to the jury the judge gave instructions that the defendants could not have lawfully married in the State of Florida because they were of opposite races. (R135) Defendants were found guilty and each received a sentence of 30 days in the county jail and a fine of $150.00 and in default thereof an additional 30 days at hard labor. (R158-159)

On July 3, 1962, defendants filed a motion for new trial in which it was alleged that the verdict was contrary to law and the weight of evidence, that the court erred, (1) in overruling defendants motion to quash the informaion and the motion for leave to be tried in absentia and (2) in permitting the testimony of Detective Valeriana based on his observations of the defendants to satisfy the statutory criteria defining a "Negro." (R9-10) The motion for new trial was denied. (R11)

On July 16, 1962, defendants duly filed a notice of appeal to the Supreme Court of Florida. (R11-12) Assignments of Error, filed on August 2, 1962, alleged that the court erred in overruling the motions to quash the inforation and the motion for leave to be tried

ARGUMENT

Conviction Of Defendants Denies Them Equal Protection Of The Laws Guaranteed By The Fourteenth Amendment To The United States Constitution And Is Before The Court On Assignment Of Errors Number 1 B.

Defendants were convicted under a statute which established a maximum penalty of 12 months in jail and a fine of $500 for any Negro and white to habitually occupy the same room at night when unmarried. Defendants' claim to denial of equal protection of the laws under the Fourteenth Amendment rests intially on two grounds: Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, then higher penalties are imposed on the persons whose races differ than would be applicable to persons of the same race who commit the same acts.

The crime under Section 798.01 of the Florida Statutes arises only in connection with the activities of one definite category of persons—interracial couples. There is no statute in Florida which prohibits unmar-

ried persons regardless of race from habitually occupying a room during the night. Negro couples or white couples may participate without penalty in the same behavior (habitually occupying a room at night) which is the basis for a criminal prosecution for couples who differ as to race.

The state, therefore, has made a classification of persons solely in terms of their race and subjected specific behavior by this group of persons and only this group of persons to criminal prosecution. The general criterion for evaluating the compatibility of state legislation with the demands of the equal protection clause of the Fourteenth Amendment, was stated in **Quaker City Cab Co. v. Pennsylvania,** 277 U. S. 389, 406:

> "In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real . . . so that all actually situated simliarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.

The usual presumption in favor of legislation does not operate where racial distinctions are a factor. **Korematsu v. U.S.** 323 U.S. 214 and **Hirabayashi v. U.S.**

320 U.S. 81. The state must meet the burden of showing that limiting the definition of a crime to interracial activities is in the furtherance of a legitimate state purpose. Racial discrimination which is the aim of the statute under which the defendants were convicted is not a legitimate governmental purpose. **Bolling v. Sharpe,** 347 U.S. 497 and **Shelley v. Kraemer** 334 U.S. 1. Consistently in area after area the Supreme Court has held that race is not a legitimate means of legislative classification by the state. Race has been disapproved as a determining factor in: the right to follow a lawful occupation, **Yick Wo v. Hopkins;** 118 U. S. 356; the right to serve on juries, **Carter v. Texas** 177 U.S. 442; the right to buy, sell or occupy property, **Buchanan v. Warley,** 245 U.S. 601; the right to attend public schools, **Brown v. Board of Education,** 347 U.S. 483; and the right to participate in primary elections, **Nixon v. Herndon** 273 U.S. 536.

The Supreme Court has often held that race is "constitutionally an irrelevance," **Edwards v. California** 314 U.S. 160, 185 and that criminal justice must be administered "without reference to considerations based on race." **Gibson v. Mississippi,** 162 U.S. 565, 591.

In the only cases in which any exception to this rule was had, **Korematsu** and **Hirabavashi, supra,** the federal government was permitted to place military restrictions upon persons of Japanese descent during World War II. The action was justified on the grounds that during war time a government may have access to extreme measures which would be impermissible absent an emergency situation. The court in **Hiraba-**

vashi felt constrained to say, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" (at page 100), and later in **Korematsu** it was said, "courts must subject them (racial distinctions) to the most rigid scrutiny" (at page 216). It was also noted that the Fifth Amendment, against which this action was tested, contains no equal protection clause. The states, however, are specifically bound to equal protection of the laws under the Fourteenth Amendment, which amendment was primarily designed to protect Negroes from state imposed racial discrimination. **Strauder v. West Virginia,** 100 U.S. 303, 307. There are presently no decisions which stand as supporting authority for racial groupings by the states. Casting a prohibition of criminal activities in terms of the racial compostion of the participants therefore has no relationship to the furtherance of any legitimate state purpose.

That the statute in question is designed to deny equal protection of the laws is more obvious here where the race of defendants is the sole basis for an increased penalty imposed on illicit behavior. Section 798.03 of the Florida statute prohibits fornication and on its face would apply to all persons regardless of race. It appears that this general fornication statute is aimed at essentially the same behavior proscribed in Section 798.05 of the Florida statutes under which the defendants were tried. The maximum penalty under Section 798.03 is only three months and a fine of $:0.00 as opposed to a maximum penalty of 12 months

and $500 under Section 798.05. Defendants therefore could participate in the same behavior as two persons of the same race (habitual fornication in a room at night) and yet receive a sentence nine months longer and a fine greater by $475.00, the difference in their races being the sole basis of the increased penalties.[1] Although each defendant received only 30 days and a fine of $150, the greater range in penalty in the statute may act to increase the actual sentence received.

The Supreme Court in **Pace v. Alabama** 106 U.S. 583 upheld a statute similar to that involved in this case which forbade fornication and adultery between Negroes and whites. Although a general fornication statute applicable without regard to race carried lesser penalties, the court there found no denial of equal protection because the statute under which the defendants were convicted carried penalties which were equal for both the white and Negro involved. The **Pace** case, decided some 80 years ago, is squarely in conflict with all presently existing interpretations of the equal protection clause. The issue is not whether each race considered as a group is treated equally, but whether the individual complainant has been denied equal protection of the laws. In **McCabe v. Atchison, Topeka, and Santa Fe Railroad,** 235 U.S. 151, the court found that

[1] It may be claimed that the general fornication statute defines a different crime from the statute prohibiting habitual occupancy of a room and therefore cannot be compared. The State's policy, however, to impose higher penalties on illicit sexual behavior between Negroes and whites is made clear by comparing Section 798.04 of the Florida statutes to the general fornication statute. Section 798.04 forbids fornication between Negroes and whites and imposes maximum penalties of 12 months or a fine not exceeding $1,000, whereas the general fornication statute forbids the same activity but has no racial classification and imposes the lesser penalty of 3 months or $30 fine.

4 Negro complainants were denied equal protection of the laws under a statute permitting railroads to refuse accommodations to any particular Negro if there were not a large enough demand for such facilities by Negroes as a group. The court said:

> "The essence of a constitutional right is that it is a personal one . . . It is the individual who is entitled to equal protection of the laws."

The invasion of a personal constitutional right is claimed here by both the Negro and white defendant and cannot be satisfied by reference to the general treatment two racial groups receive in relation to one another. **Shelley v. Kraemer, supra,** is the final rejection of the argument that denial of equal protection of a Negro is justified if a white is similarly denied equal protection:

> "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of equalities." (at page 22.)

In circumstances such as these, the minimum demanded by equal protection of the laws is that "no different degree or higher punishment shall be imposed upon one than is imposed on all for like offense." **Moore v. Missouri,** 159 U.S. 673, 678. Both the Negro and the white defendant are denied equal protection of the laws, as each is subjected to a higher penalty

than they would have been if they had been of the same race.

DEFENDANTS' CONVICTION DENIED THEM DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT IN THAT A LAWFUL MARRIAGE WAS HELD TO BE UNAVAILABLE AS A DEFENSE TO THE CRIME SOLELY BECAUSE OF DEFENDANT'S RACE AND IS BEFORE THE COURT ON ASSIGNMENT OF ERRORS NO. 1C AND 1D.

In charging the jury the judge stated:

> I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this State to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void.

The charge that the defendant could not as a matter of state law have made a valid marriage in Florida is well supported by various miscegenation statutes and the Florida Constitution. Section 741.11 of Florida Statutes and Article 16, Section 24 of the Florida Constitution makes it unlawful for any Negro and white to intermarry and voids all such marriages, making the offspring bastards who are disabled from inheriting. Section 741.12 sets a maximum penalty of 10 years and a fine of $1,000 for both parties to such an unlawful marriage. Sections 741.13, 741.14, 741.15, 741.16 prohibit the issuing of a marriage license and the performing of the marriage ceremony for any Negro and

white, setting penalties ranging from $1,000 fine to two years in prison. The statute under which defendants were prosecuted makes their lawful marriage to each other an absolute defense to the charge. The State of Florida gives full recognition to the common law marriage, and there was some evidence (contradicted by other testimony) of a common law marriage between the defendants. (R. 30-31, 135) The judge's charge, however, based on existing state law, removed from the jury any consideration of evidence tending to establish the defense of marriage in the State of Florida since the defendants were a Negro and a white.

The issue, then, is, does the state deny equal protection of the laws by depriving defendants of a defense to a criminal charge solely because of their race? Put in other terms, the question is whether the state may constitutionally prohibit marriage between persons of different races.

The Supreme Court of the United States has had two opportunities to rule on this latter question. The court, however, has not as yet accepted any case and rendered a decision. **Jackson v. The State of Alabama,** cert. den., 348 U.S. 88 (1954) and **Naim v. Naim,** 197 Va. 80, 87, S. E. 2d 749 (1955), judgment vacated 350 U.S. 891 (1955), judgment reinstated 197 Va. 734, 90 S.E. 2d 849 (1956), appeal dismissed 350 U.S. 985 (1956). In the later case, the Supreme Court granted certiorari but then decided that the record was not complete as to the domicile of the parties and remanded it to the Virginia Supreme Court to be returned to the trial court so that evidence could be

taken. That court held the record clearly showed that the plaintiff was a resident of Virginia; the defendant a non-resident and that both parties had been married in North Carolina for the purpose of circumventing the Virginia miscegenation statute. Upon application to the Supreme Court to recall the remand, the court held that the second judgment of the Virvinia court left the case devoid of a properly presented federal question and denied the application.

There is, therefore, no authority from the Supreme Court of the United States that a state may constitutionally prohibit an interracial marriage. (The **Pace** case concerned solely a prohibition on fornication and adultery which cannot be conclusive on the constitutionality of the prohibition of marriage, an otherwise lawful and approved relationship.)

The state has traditionally exercised some residual control over the marital institution. **Maynard v. Hill**, 125 U.S. 190, **Reynolds v. U.S.**, 98 U.S. 145. However, the right to marry has been held to be a right guaranteed under the due process clause of the Fourteenth Amendment and thereby protected from arbitrary deprivation by the states. In **Meyer v. Nebraska**, 262 U. S. 390, 399, the court said:

> "While this court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . ."

Therefore state legislation must meet the demands of due process of law when nullifying or controlling this kind of liberty or freedom of association. Further, as with all state laws, the equal protection clause demands that no party be deprived of a right which is available to others similarly situated. **Sipuel v. Oklahoma State Regents,** 339 U.S. 637; **Sweatt v. Painter,** 339 U.S. 629. The essence of the right to marry is a freedom to join in mariage with the person of ones own choice. The state, substantially impairs that right by limiting valid marriages to persons of the same race. The curtailment of the right to marry has not been exercised in accord with the dictates of the due process and equal protection clauses of the Fourteenth Amendment for the sole aim and purpose of such legislation is the imputation of inferiority to the members of the Negro race. The legislation is designed to maintain the supposed "purity" of the superior white race and to prevent intermingling with Negroes who are deemed to be inherently defective persons. State laws which are aimed solely at relegating one group to an inferior status by enforced segregation solely because of their race are void as a denial of equal protection of the laws, **Brown v. Board of Education,** 347 U.S. 483, and a denial of due process of law. **Bolling v. Sharpe, 347 U.S. 497.**

An incident of the right to marry is the right of privacy, for the choice of one's marital partner affects one of the most intimate and private relationships that an individual can enter. Further, under this statute, not only is a private relationship subjected to criminal prohibitions but a private place—the home—is sub-

jected to governmental invasion. The commission of the crime, as was the case here, will more likely than not be aleged to have occurred in the living quarters of the defendants. These premises therefore become subjected to the governmental controls, of search, surveillance, and arrest, which are appropriate where criminal activities are in process. There has been a growing recognition that the due process clause protects the right of privacy, another form of "liberty," from unwarranted governmental interference. **Mapp v. Ohio,** 367 U.S. 643, 6 L.ed. 2d 1081; See also **Poe v. Ullman,** 367 U.S. 497, 6 L.ed. 2d 989, 1004, 1022-1026 (dissenting opinions); **Gilbert v. Minnesota,** 254 U.S. 325, 335, 336 (dissenting opinion); **Public Utilities Commission v. Pollack,** 343 U.S. 451, dissenting opinion). The state cannot meet the burden of showing that any valid governmental purpose is furthered by depriving individuals of the privacy of their homes and a marital relationship solely because the mate they have chosen is of a different race.

All of which is respectfully submitted this 6th day of December, 1962.

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing brief was mailed to the office of the Attorney General in Tallahassee, Florida this 7th day of December, 1962.

Of Counsel for Appellants

G. E. Graves, Jr.